



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the Modification to Ballast Water  
General Permit No. WI-00638535-01-1 to  
Discharge Under the Wisconsin Pollutant  
Discharge Elimination System, Issued April 1,  
2011

Case No. IH-11-62

Application of the United States Environmental  
Protection Agency for a Water Quality  
Certification for Issuance of a National Pollutant  
Discharge Elimination System Vessel General  
Permit for Regulating Discharges Incidental to the  
Normal Operation of a Vessel

Case No. IH-12-41

Application of the United States Environmental  
Protection Agency for a Clean Water Act Water  
Quality Certification for Issuance of a National  
Pollutant Discharge Elimination System Vessel  
General Permit for Regulating Discharges  
Incidental to the Normal Operation of a Vessel

Case No. IH-12-44

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**RULING ON MOTIONS FOR SUMMARY JUDGMENT**

On September 7, 2012, the Wisconsin Department of Natural Resources (WDNR) filed a Motion for Partial Summary Judgment. On September 10, 2012 the Lake Carriers' Association, Polska Zegluga Morska, Fednav Limited and its subsidiaries, Canfornav, Inc. and the Shipping Federation of Canada and the National Wildlife Association and Wisconsin Wildlife Association all filed Motions for Summary Judgment. The parties submitted various supporting materials and filed briefs, the last of which was received on October 9, 2012.

On November 19, 2012, the Division of Hearings and Appeals (Division) was informed that WDNR must submit its water quality certification on EPA's next draft Vessel General Permit (VGP-2) by November 30, 2012. On November 27, 2012, DNR counsel submitted a link to a decision of the Minnesota Court of Appeals filed on November 13, 2012, regarding a challenge to the 401 water quality certification issued by the Minnesota Pollution Control Agency, which discussed several of the same issues as in this proceeding. (*In the Matter of the Decision on the Approval for Submittal of a 401 Water Quality Certification to the U.S. Environmental Protection Agency for the Draft 2013 Vessel General Permit and the Draft 2013 Small Vessel General Permit* (State of Minnesota in Court of Appeals A12-1661))

The PARTIES to this proceeding are certified on a preliminary basis as follows:

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and the Shipping Federation of Canada (As a Courtesy, See Below Page 4), by

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## **The Motions**

### **The Department of Natural Resources' Motion**

The WDNR moved for partial summary judgment based upon the following:

WDNR contends that the performance standard and conditions in the Modified Permit and Conditional Certification are the most stringent standards technologically feasible. WDNR requests the Administrative Law Judge to rule that the Modified Permit and Conditional Certification contain performance standards and conditions that are the most stringent standards technologically feasible, and that these standards, in combination with the other terms and conditions of the Modified Permit and Conditional Certification, reasonably assure compliance with Wisconsin water quality standards for aquatic non-indigenous species discharged in ballast water.

September 7, 2012, WDNR Motion for Partial Summary Judgment.

In support of its Motion, the DNR listed 45 facts which it asserted were undisputed, and which no party challenged in subsequent submittals. No party objected to any of these facts, which are adopted below. The DNR also submits the affidavit and supplemental affidavit of Susan Sylvester, Director of the Water Quality Bureau in the Water Division, as well as other supporting materials.

### **The National Wildlife Federation, Wisconsin Wildlife Federation, Natural Resources Defense Council, George Meyer, Charles Matyska, Lillian Pipping, Tom Nissen, Lawrence Freitag, and Don Hammes' Motion**

The above-named petitioners moved for an order granting summary judgment (1) that Section 4 of the DNR's Modified WPDES Permit is not reasonable, because it does not include or require compliance with water quality-based effluent limitations for non-indigenous species discharged in ballast water, contrary to law, and (2) that DNR's conditional water quality certification determination regarding the U.S. Environmental Protection Agency's Proposed 2013 Vessel General Permit does not reasonably assure that ballast water discharges will comply with Wisconsin water quality standards.

In support of its motion, these petitioners presented the following affidavits to support standing asserting that the National Wildlife Federation, Wisconsin Wildlife Federation, and Natural Resources Defense Council—having standing through their members, and that the individual petitioners—George Meyer, Don Hammes, Charles Matyska, and Lillian Pipping—have standing in their own right. (The Wildlife Petitioners or Conservation Petitioners) *Affidavit of Andrew Buchsbaum* (Ex. 82); *Affidavit of Anne Senft* (Ex. 83); *Affidavit of George Meyer* (Ex. 84); *Affidavit of Don Hammes* (Ex. 85); *Affidavit of Charles Matyska* (Ex. 86); *Affidavit of Lil Pipping* (Ex. 87); *Affidavit of Henry L. Henderson* (Ex. 88); *Affidavit of Louise Petering* (Ex. 89).

No party has challenged the standing of any of these petitioners, and they have established standing in this proceeding.

In support of the substance of its motion, these petitioners also submitted the affidavit of its expert, Dr. Andrew N. Cohen, as well as other supporting materials.

### **The Lake Carriers' Association Motion**

On September 10, 2012 the LCA filed its motion for summary judgment. The LCA Motion noted that the issue in both Case No. IH-11-62 and Case No. IH-12-41 is whether it was unreasonable for the WDNR not to include water quality based effluent limitations in the state vessel general permit (Case No. IH-11-62) and DNR's certification of the federal vessel general permit (Case No. IH-12-41). The LCA Motion argued for dismissal of both cases because there currently are no applicable water quality standards for non-indigenous species, and, therefore, as a matter of law, there is no explicit legal basis upon which DNR could impose quality based effluent limitations in the permit or the certification. The LCA motion relied upon the affidavits of its expert James Weakley, and of Attorney Harbeck, as well as other supporting materials.

### **Polska Zegluga Morska, Fednav Limited and its subsidiaries, Canfornav, Inc. and the Shipping Federation of Canada Motion**

On September 10, 2012, Polska Zegluga Morska, Fednav Limited and its subsidiaries, Canfornav, Inc. and the Shipping Federation of Canada filed a Motion for Summary Judgment. This motion relied upon the affidavits of experts Ms. Caroline Gravel and Mr. Gary Croot; and that of Attorney Fazio. However, on November 12, 2012, a Stipulation resolving the issues set forth in the motion of these petitioners was received. A related Order was entered on November 20, 2012.

### **Summary of Issues**

The DNR fairly summarized the issues of the various petitions as follows:

1. Whether Section 4 of Permit No. WI-0063835-01-1 is not reasonable because it does not include or require compliance with water quality based effluent limitations for non-indigenous species discharged in ballast water, contrary to law (IH-11-062).
2. Whether WDNR's conditional water quality certification determination regarding the United States Environmental Protection Agency's Proposed Vessel General Permit reasonably assures that ballast water discharges will comply with Wisconsin water quality standards; pursuant to s. NR 299.04(1)(b), Wis. Adm. Code (IH-12-041).

3. Whether conditions 5(b) and (c) of WDNR's conditional water quality certification determination regarding the United States Environmental Protection Agency's Proposed Vessel General Permit reasonably assure that ballast water discharges will comply with Wisconsin water quality standards, pursuant to s. NR 299.04(1)(b), Wis. Adm. Code, or whether those conditions impose deadlines that are not technologically practicable to meet (IH-12-044).

### **Regulatory Context and Applicable Law**

The federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2006), "is a comprehensive water quality statute designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *PUD No. 1 of Jefferson Cnty. V. Washington Dep't of Ecology*, 511 U.S. 700, 704, 114 S. Ct. 1900, 1905 (1994). (33 U.S.C. § 1251(a)) The CWA "establishes distinct roles for the Federal and State Governments." *Id.* The Environmental Protection Agency (EPA) is charged with, among other things, setting limits on discharges into the country's navigable waters. *Id.* (33 U.S.C. §§ 1311, 1314) One of the states' roles is to create water-quality standards, which must "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." *Id.* (quoting 33 U.S.C. § 1313(c)(2)(A)). State-created water-quality standards "shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of" the CWA and "shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational [and other purposes]." *Id.* at 704-05 (alteration in original) (33 U.S.C. § 1313(c)(2)(A))

As a general rule, the CWA prohibits the discharge of pollutants into navigable waters, unless a person has a permit allowing the discharge. (33 U.S.C. § 1311) A permit issued pursuant to the CWA must incorporate applicable effluent limits. (33 U.S.C. § 1342(a)(1); 40 C.F.R. § 122.44(a)(1) (2012)) An "effluent limit" is "any restriction established by a State or the [EPA] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged" into waters regulated by the CWA. (33 U.S.C. § 1362(11)) A permit for the discharge of pollutants also must include conditions that will result in compliance with state water-quality standards. (33 U.S.C. § 1342(a)(1); 40 C.F.R. § 122.44(d) (2012)) Under section 401 of the CWA, the EPA may not issue a permit allowing discharges of pollutants into navigable waters unless the states affected by the permit have certified that the permitted activity will comply with certain provisions of the CWA and applicable state laws or have waived their right to make such a certification. (33 U.S.C. § 1341(a)(1))

Wisconsin has adopted water quality standards for Wisconsin surface water in Wis. Admin. Code ch. NR 102, and set forth a procedure for Section 401 water quality certification in ch. NR 299. Additional water quality standards are set forth in Wis. Admin. Code NR 103-106.

The Modified Permit is issued as a Wisconsin Pollution Discharge Elimination Permit (WPDES) state permit as authorized under 33 USC § 1342. The requirements for such permits for discharge of ballast water are set forth under § 283.31 and § 283.35.

The EPA recognizes two general types of effluent limits that may be imposed as conditions on a NPDES VGP: technology-based effluent limits (TBELs) and water-quality-based effluent limits (WQBELs). *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 85 (2d Cir. 2006). TBELs “reduce levels of pollution by requiring a discharger to make equipment or process changes, without reference to the effect on the receiving water.” *City of Arcadia v. United States EPA*, 411 F.3d 1103, 1105 (9<sup>th</sup> Cir. 2005). WQBELs, on the other hand, focus on water-quality outcomes with reference to particular standards that may be established by a state for a particular body of water. *Catskill Mountains*, 451 F.3d at 85 n. 9. Furthermore, WQBELs, like the water-quality standards themselves, may be expressed in either numeric or narrative terms. See: *In re Alexandria Lake Area Sanitary Dist. NPDES/SDS Permit No. MN0040738*, 763 N.W.2d 303, 309 (Minn. 2009).

### **Summary Judgment Methodology**

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. (Wis. Stat. § 802.08(2)) The inferences to be drawn from the underlying facts are to be viewed in the light most favorable to the party opposing the motion. (*Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶23, 241 Wis. 2d 804, 623 N.W.2d 751)

If there is any reasonable doubt regarding whether there exists a genuine issue of material fact, that doubt must be resolved in favor of the nonmoving party. (*Schmidt v. Northern States Power Co.*, 2007 WI 136, ¶24, 305 Wis. 2d 538, 742 N.W.2d 294)

The Wisconsin Court of Appeals recently restated longstanding Wisconsin summary judgment methodology: We first examine the complaint to determine whether it states a claim and then review the answer to determine whether it joins a material issue of fact or law. If we conclude that the complaint and answer are sufficient to join issue, we examine the moving party’s affidavits to determine whether they establish a prima facie case for summary judgment. If they do, we look to the opposing party’s affidavits to determine whether there are any material facts in dispute that entitle the opposing party to a trial. (*State of Wisconsin v. Basil E. Ryan, JR.*, 2011 WI App 21, ¶21)

We first examine the complaint to determine whether it states a claim and then review the answer to determine whether it joins a material issue of fact or law. The Department of Natural Resources found that the petition filed by the National Wildlife Federation, Wisconsin Wildlife Federation, and Natural Resources Defense Council sets forth a claim and hearing was granted on the issues described above. Further, the WDNR also reasonably found that the petition of the Lake Carriers’ Association state a claim for relief at the time the hearing request was granted.

Accordingly, we will look to the affidavits and legal arguments of the competing motions for summary judgment as a whole and determine if any party has established a prima facie or final showing that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

## **Adopted Findings**

None of the following facts, proposed by the WDNR were objected to by any party. Accordingly, 1 through 45 below are adopted as undisputed by the Division.

### **Regarding ballast water and AIS/ANS**

1. The Great Lakes seaway system from the St. Lawrence River through the Great Lakes is a bi-national waterway used by vessels from the International Fleet, the U.S.-Flag Fleet, and the Canadian-Flag Fleet. The system is subject to regulation by state, federal, and provincial agencies in the United States and Canada.

2. Vessels using the Great Lakes seaway system discharge ballast water into the Great Lakes, including the waters of Wisconsin. Ballast water is water taken on or discharged by cargo ships to compensate for changes in the ship's weight as cargo is loaded or unloaded and as fuel and supplies are consumed.

3. When a ship takes on ballast water, whether fresh water or salt water, organisms found in that water may be taken in as well. When a ship discharges ballast water, organisms found in that water may be discharged.

4. Prior to 2006, aquatic invasive species ("AIS"), also known as aquatic nonindigenous species ("ANS"), were introduced in the Great Lakes through ballast water discharges from ocean-going vessels.

5. In many cases, the population of ANS can become established after just a few years. Some ANS have out-competed native species.

6. ANS have cost communities and businesses within the Great Lakes region hundreds of millions of dollars.

7. A primary way to prevent ANS from entering the Great Lakes is the control of ballast water discharges.

8. Concern about ANS led to proposed changes in state, federal and international regulations.

### **Regarding IMO regulations**

9. The International Maritime Organization ("IMO") adopted the International Convention for the Control and Management of Ships' Ballast Water and Sediments ("IMO Convention") in February 2004. The IMO Convention is not currently in force and has not been ratified by the United States. The IMO Convention will enter into force upon ratification by 30 countries, representing 35 per cent of the world's shipping tonnage.

10. Regulation D-1 of the IMO Convention contains a ballast water exchange standard. Under Regulation D-1, ships performing ballast water exchange must do so with an efficiency of 95 per cent volumetric exchange of ballast water. For ships exchanging ballast water by the pumping-through method, pumping through three times the volume of each ballast water tank will be considered to meet the standard described. Pumping through less than three times the volume may be accepted provided the ship can demonstrate that at least 95 per cent volumetric exchange is met.

11. Regulation D-2 of the IMO Convention contains a ballast water discharge performance standard. To comply with the D-2 performance standard, ballast water discharge must contain: (1) less than 10 viable organisms per cubic metre greater than or equal to 50 micrometres in minimum dimension; and (2) less than 10 viable organisms per milliliter less than 50 micrometres in minimum dimension and greater than or equal to 10 micrometres in minimum dimension. Indicator microbes must not exceed specified concentrations. The indicator microbes, as a human health standard, include, but are not limited to: (a) Toxicogenic *Vibrio cholera* (O1 and O139) with less than 1 colony forming unit (cfu); (b) *Escherichia coli* less than 250 cfu per 100 milliliters; and (c) Intestinal Enterococci less than 100 cfu per 100 milliliters.

12. Regulation D-3 of the IMO Convention contains approval requirements for ballast water management systems. Ballast water management systems include systems that make use of chemicals or biocides, systems that make use of organisms or biological mechanisms, and systems that alter the chemical or physical characteristics of ballast water.

### **Regarding U.S. Coast Guard Regulations**

13. The United States Coast Guard (“USCG”) regulates ballast water discharges under the National Invasive Species Act (“NISA”).

14. USCG regulations were first issued in 1993. The regulations required ballast water on ocean-going vessels to be exchanged for mid-ocean sea water. Exchanging ballast water at sea removes organisms that flow with the water from a vessel’s ballast and exposes any organisms remaining in the ballast to salt water. Salt water acts as a natural biocide against fresh water organisms found in ballast water.

15. In August 2009, USCG proposed revised regulations that established numeric concentration-based limits for organisms in ballast water.

16. On March 23, 2012, USCG issued a final rule adopting performance standards for ballast water discharge. The final rule adopts a “Phase 1 standard” that has the same concentration limits as the IMO D-2 performance standard described above. The final rule does not include a more stringent “Phase 2 standard” of 1,000 x IMO, which the USCG had proposed in 2009.

17. In explaining why the final rule contained only the Phase 1 standard, USCG cited a 2011 report by the Scientific Advisory Board (“SAB”) to the USEPA:



The Coast Guard has found, based on the best scientific information available to the Coast Guard (including the previously referenced EPA SAB study on technologies and systems to minimize the impacts of invasive species in vessel ballast water discharge (EPA SAB 2011)), that there are currently no BWMS [ballast water management systems] that have demonstrated the capability to meet a standard more stringent than the phase-one standard.

77 Fed. Reg. 17254, 17263 (March 23, 2012). The USCS regulations are available at: <http://www.gpo.gov/fdsys/pkg/FR-2012-03-23/pdf/2012-6579.pdf>.

18. The USCG final rule amended the process for obtaining approval from the USCG for ballast water treatment systems. The USCG is the only agency that provides approvals for systems installed on U.S.-flagged vessels.

19. The USCG “type approval” process is complicated. It includes testing requirements that incorporate an Environmental Technology Verification Protocol (“ETV”), developed by the USEPA and the USCG.

20. USCG has not issued any approvals for ballast water treatment systems. USCG plans to certify systems based on IMO standards and will not certify beyond the IMO standards.

#### **Regarding USEPA Regulations**

21. Prior to 2008, the United States Environmental Protection Agency (“USEPA”) did not regulate ballast water discharges under the Clean Water Act (“CWA”).

22. In December 2008, the USEPA issued a Vessel General Permit (“VGP”). The VGP set technology-based effluent limits for ballast water discharges that rely on “best management practices.” Best management practices include salt water flushing and ballast water exchange.

23. EPA’s VGP does not contain numeric performance standards for ballast water discharges. The VGP is set to expire in December 2013.

24. On November 30, 2011, USEPA issued a draft next Vessel General Permit (“VGP-2”). Among other provisions, section 2.2.3.5. of VGP-2 contains numeric ballast water discharge limits for most vessels. These numeric limits are equivalent to the IMO D-2 standards.

25. On December 8, 2011, USEPA requested a water quality certification under section 401 of the CWA (33 U.S.C. § 1341) from WDNR for VGP-2. WDNR reviewed USEPA’s proposed VGP-2 pursuant to section 401 and ch. NR 299, Wis. Admin. Code.

26. On March 29, 2012, WDNR issued a Conditional Certification to the USEPA VGP-2.

27. The conditions imposed by WDNR in its Conditional Certification include a requirement that ocean-going vessels perform open ocean ballast water exchange or saltwater flushing, as well as meet the numeric discharge standards in WDNR's ballast water discharge General Permit [conditions 4 and 5(a)].

**Regarding WDNR's WPDES Ballast Water Discharge General Permit**

28. On November 18, 2009, WDNR issued a WPDES General Permit to regulate ballast water discharges. The General Permit was issued under s. 283.31, Wis. Stats., Wisconsin's authority to regulate discharges of pollutants into waters of the state. The General Permit contained two different numeric standards. The standard in Table A was 100 times more stringent than the IMO-D2 standard. The standard in Table B was equivalent to the IMO-D2 standard.

29. Subsection 4.1.1 of the General Permit required WDNR to make a feasibility determination on the performance capability of ballast water treatment systems and whether there would be commercially available treatment systems compliant with the standards.

30. On January 13, 2010, WDNR requested that the Great Lakes Ballast Water Collaborative ("BWC") act as a technical advisory committee to advise WDNR on the General Permit numeric standards.

31. The BWC was formed in 2009 to share relevant information, foster better communication, and partner to reduce ANS introduction and dissemination risks. The BWC includes diverse experts on ballast water issues, including government regulators, commercial maritime representatives, scientists and researchers, and representatives from non-governmental organizations from the United States and Canada.

32. WDNR asked the BWC to respond to three questions relating to: (1) Identifying commercially available treatment systems rated to meet or exceed a standard beyond the IMO D-2 standard for fresh water environments; (2) Evaluating factors affecting the installation of specific ballast water treatment systems on the applicable fleets and vessels transiting the Great Lakes; and (3) Assessing current verification capabilities for treatment systems to comply with a discharge standard of 100 x the IMO D-2 standard.

33. The BWC created three subgroups to work on WDNR's questions. The BWC met in May 2010 in Montreal, Quebec, and in July 2010 in Duluth, Minnesota, to discuss the questions posed by WDNR. The final workgroup report (the July 2010 Duluth report) was submitted to the BWC at a meeting in January 2011 in Toronto, Ontario.

34. WDNR's Feasibility Determination was completed on December 14, 2011. The Feasibility Determination was based on WDNR's review of currently available technical information, including draft information developed for the USEPA SAB report, referenced in suggested Finding of Fact 17 and contained in Appendix A to the Sylvester Affidavit, and on the conclusions of the BWC's general discussions and workgroup efforts.

35. As part of the Feasibility Determination, WDNR examined whether the following criteria were met:

- A. Treatment technologies are available to meet the Wisconsin standards in Table A of the General Permit.
- B. Treatment technologies are commercially available.
- C. It is feasible to install the technologies onboard both new and existing vessels.
- D. Sufficient time exists to comply with the discharge standard's effective dates.

36. The Feasibility Determination includes the following statements:

It is currently not possible to verify that any available ballast water treatment system can meet the Wisconsin 100 x IMO standard. . . Therefore, the conclusion is that treatment technologies are not able to demonstrate compliance with the Wisconsin standards in Table A of the General Permit.

[T]here are many factors to consider in determining whether treatment technologies are commercially available. The conclusion is that they are not commercially available at 100 x IMO treatment levels at this time.

[I]t is not yet practicable to install BWTS [ballast water treatment system] technologies onboard existing or new vessels. Thus, the conclusion is that it is not feasible to install the technologies onboard both new and existing vessels.

The IMO discharge standard for treatment systems becomes effective in 2012 for new ocean-going vessels and in 2014 for existing ocean-going vessels. . . . sufficient time does exist to comply with the IMO discharge standard's effective dates.

37. On December 14, 2010, WDNR issued a public notice for the modified WPDES General Permit. Public comments were received through February 4, 2011.

38. In responding to public comments, WDNR stated:

While treatment beyond the IMO standard appears promising, some treatment feasibility questions remain because of unknowns about cost effectiveness, commercial availability, practicability, compliance demonstration and effectiveness in freshwater ecosystems. Any treatment system would also need to receive approval from the USCG to be installed on vessels; thus standards inconsistent with the USCG may conflict with the approval process. Insurance companies will not insure US vessels without USCG type approval. This type approval is necessary before a treatment system can be installed on board.

39. Because WDNR determined that the standards in Table A of the General Permit, a standard 100 times more stringent than the IMO, are not currently achievable, pursuant to Subsection 4.1.1. of the General Permit, WDNR determined that the standards in Table B of the General Permit, the IMO-D2 standards, would be used in the WPDES General Permit.

40. On April 1, 2011, WDNR issued its modified General Permit to Discharge Ballast Water Under the Wisconsin Pollutant Discharge Elimination System (Modified Permit).

41. The conditions imposed by WDNR in the Modified Permit include a requirement that ocean-going vessels perform open ocean ballast water exchange or saltwater flushing, as well as meet the IMO D-2 numeric discharge standards.

42. In assessing how to regulate ballast water discharges, WDNR reviewed the work of scientists who have studied the effectiveness of ballast water exchange and flushing. WDNR considered that scientists have found these practices effective in decreasing the number of organisms in ballast water tanks and that no new aquatic nonindigenous species have been reported in the Great Lakes since 2006. One example of the research reviewed by WDNR is titled “Evaluating Efficacy of an Environmental Policy to Prevent Biological Invasions,” by Dr. Sarah Bailey, Research Scientist with Fisheries and Oceans Canada, and others.

43. WDNR imposed the requirements of ballast water exchange for ocean going vessels combined with ballast water discharge performance standards to remove the highest risk organisms from the ballast tanks before vessels enter the Great Lakes, thus providing extra protection from the introduction of aquatic nonindigenous species.

44. USEPA’s Scientific Advisory Board report, issued in July 2011, states that Wisconsin’s approach of combining ballast water exchange with shipboard ballast water treatment is “targeting an enhanced level of protection” similar to what has been proposed by Canada.

45. The conditions in the Modified Permit issued in 2011 are the same as the conditions in Wisconsin’s Conditional Certification to the VGP-2, issued March 29, 2012.

### **Additional Undisputed Facts**

Especially prior to 2006, ballast water discharged by oceangoing vessels was a primary vector for aquatic invasive species (AIS) entering the Great Lakes. *DNR’s Responses to RFAs* at 7 (No. 32). The zebra mussel, quagga mussel, Eurasian ruffe, round goby, and spiny water flea were likely introduced to the Great Lakes by ballast water discharges. *DNR’s Responses to RFAs* at 10 (Nos. 51, 59, 65, 72). AIS may be introduced by many vectors, not only by ballast water. *DNR’s Responses to RFAs* at 20 (No. 101). These include cultivation, fish stocking, diseases and parasites with fish, canals and diversions, aquarium and live bait releases, and recreational boating. (LCA Ex. 17, Jenson) However, this fact does not alter the need to control AIS from entering the Great Lakes through ballast water discharges.

Lakers – vessels that operate exclusively within the Great Lakes – are significantly larger than oceangoing vessels and carry up to ten times the ballast water. *DNR's Responses to RFAs* at 7 (Nos. 35, 36); *Environmental Assessment* at 4. They play a significant role in spreading AIS after they have been introduced by taking up and discharging billions of gallons of ballast water every year. *DNR's Responses to RFAs* at 7 (Nos. 35, 36), 8 (No. 40); *Environmental Assessment* at 4; See Rup. M.P., et al., *Domestic Ballast Operations on the Great Lakes: Potential Importance of Lakers as a Vector for Introduction and Spread of Nonindigenous Species*, Can. J. Fish. Aquat. Sci. 67(2): 256, 263 (2010) (Ex. 73). Lakers are likely “the most important ballast-mediated pathway of secondary spread within the Great Lakes.” *Id.* Lakers do not introduce ANS to the Great lakes, although they may contribute to the spread of ANS within the Great Lakes. (Sylvester Supplemental Affidavit, p. 6, #27) “The potential distance and speed of secondary spread . . . are much greater than would be achieved by natural, passive dispersal.” Treatment systems under development for oceangoing vessels would not work for the existing laker fleet because in-line treatments cannot accommodate the rapid flow rates and shorter trip times of lakers relative to oceangoing vessels. (Weakley Affidavit #6)

At one time, one new aquatic non-indigenous species (ANS) was documented as entering the Great Lakes on average every twenty-eight weeks. *DNR's Responses to RFAs* at 8 (No. 39); *Environmental Assessment* at 3. In recent years, concern about AIS and ANS has led to proposed changes in state, federal and international regulations. Since 2006, following the implementation of the comprehensive ballast water standards to all oceangoing ships, no new non-indigenous species have been discovered in the Great Lakes. (LCA App. Ex. 16: USGS Non-indigenous Aquatic Species Database. (2011))

Wisconsin does not have a numeric water quality standard for aquatic nonindigenous species (ANS). The United States EPA has not set a numeric water quality standard for ANS.

EPA's General Vessel Permit Fact Sheet states that it is not feasible at this time to calculate numeric water quality based effluent limits for ANS. See Section 4.4.3.9.4.1, pages 125-126, of the Fact Sheet.

EPA's Fact Sheet refers to the June 2011 report issued by the NAS Committee on Assessing Numeric Limits for Living Organisms in Ballast Water. The NAS report concludes that the current state of science does not allow a quantitative evaluation of the relative merits of various discharge standards in terms of invasion probability. See EPA Fact Sheet, Section 4.4.3.9.4.1, Appendix M, page 125; NAS report, Appendix L, page 130.

The NAS report recommended adoption of a benchmark discharge standard, such as the IMO D-2 standard, which “clearly reduces concentrations of coastal organisms” below current levels resulting from ballast water exchange alone. See EPA Fact Sheet, Section 4.4.3.9.2, Appendix L, at pages 122; NAS report, Appendix L, page 130.

The NAS report considered and rejected a zero-detectable discharge standard for ANS. See NAS report, Appendix, pages 117-119. (Sylvester Supplemental Affidavit #20-24)

### **The LCA Motion**

In its Motion for Summary Judgment, the LCA argues that: 1) the new provisions of § 227.10(2m) obtain and require that there be an explicit statutory or code-based authority for any Water Quality Based Effluent Limitations (WQBELs) included in the permit; and 2) that the WDNR lacks legal authority to impose certain conditions in the Modified Permit and/or Certification.

The Division finds both of these arguments flawed, and, accordingly, denies the LCA Motion for Summary Judgment. First, it is clear that Wis. Stat. § 227.10(2m) does not apply to either the modified permit or the certification at issue in this case.

2011 Wisconsin Act 21 is a regulatory reform act and exclusively relates to and amends Wis. Stat. ch. 227, which is Wisconsin's administrative procedures act. The effective date of 2011 Act 21 is June 9, 2011. Wisconsin Stat. § 227.10(2m) which was created as part of Act 21, provides as follows:

227.10(2m) No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter . . .

WDNR issued its Modified Permit on April 1, 2011, which is over two months before Wis. Stat. § 227.10(2m) became effective. Thus, the provisions of § 227.10(2m) do not apply to the Modified Permit.

The Conditional Certification was issued on March 29, 2012, which is after the effective date of Act 21. However, the Conditional Certification is not a "license" issue by WDNR. The term "license" is defined in § 227.01(5) to mean "all or any part of an agency permit, certificate, approval, registration, charter or similar form of permission required by law, except . . . [certain licenses] where issuance is merely a ministerial act." The Conditional Certification was required by USEPA in order to comply with section 401 of the CWA, 33 U.S.C. § 1341. Section 1341(a) requires applicants for a *federal* license to provide a certification from the state in which a discharge originates or will originate that the discharge will comply with applicable provisions of federal law. Section 1341(a) does not require WDNR to issue a license or even to issue a certification. Section 1341(a) states:

If the State . . . fails to refused to act on a request for a certification, within a reasonable period of time . . . the certification requirements of this subsection shall be waived with respect to such Federal application.

Based on the plain language of section 1341(a), Wisconsin's Conditional Certification under section 401 of the CWA is not a "license" issued by WDNR. In fact, Wisconsin's Conditional Certification may be deemed to be waived if Wisconsin does not submit the certification prior to the deadline EPA has established for receipt of a certification.

In addition, the Conditional Certification references the Modified Permit and most conditions are essentially the same as those in the Modified Permit. (*See* Sylvester Affidavit at ¶ 48)

The provisions of § 227.10(2m) do not apply to the Conditional Certification because it is not a “license” issued by WDNR.

The second legal argument relied upon by the LCA is that the WDNR lacks legal authority for disputed conditions in the Modified Permit and Certification. The LCA argues that Wisconsin law requires both 1) an applicable water quality standard; and 2) that the technology based effluent limitations be not stringent enough to result in compliance with the applicable water quality standard.<sup>1</sup> Nowhere in these DNR code provisions, nor in any other section of DNR rules, LCA argues, are there water quality criteria which are in any way associated with the presence of non-indigenous species. In short, LCA argues, there are no “water quality criteria” associated with the presence of non-indigenous species. Without “water quality criteria” there is no applicable “water quality standard.” And without an “applicable water quality standard,” there is no explicit authority upon which DNR could impose a WQBEL in the Modified State Permit or the Certification.

However, this argument does not comport with the specific conditions which are at issue in this contested case proceeding. For example, one disputed provision is Condition 5 of the Conditional Certification. It states that vessels shall comply with the requirements in (a) through (g) to meet water quality standards for protecting the public interest. (Wis. Admin. Code § NR 102.01(2); *See* Supplemental Affidavit at ¶ 14)

The legal basis for establishing narrative water quality standards for ballast water discharges is in Wis. Admin. Code § NR 102.04(1). This rule provides as follows:

To preserve and enhance the quality of waters, surface waters uses and criteria are established to govern water management decisions. Practices attributable to . . . commercial . . . or other activities shall be controlled so that all surface waters . . . meet the following conditions at all times and under all flow and water level conditions:

(a) Substances that will cause objectionable deposits on the shore or in the bed of a body of water, shall not be present in such amounts as to interfere with public rights in waters of the state.

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<sup>1</sup> These requirements are set forth in Wis. Stat. § 283.13(5) as follows:

5) More stringent limitations. The department shall establish more stringent effluent limitations than required under subs. (2) and (4) and shall require compliance with such water quality based effluent limitations in any permit issued, reissued or modified if these limitations are necessary to meet applicable water quality standards, treatment standards, schedules of compliance or any other state or federal law, rule or regulation. The department shall require compliance with these water quality based effluent limitations by no later than July 1, 1977, or by a later date as specified in the water quality standard, treatment standard, schedule of compliance or other state or federal law, rule or regulation.

...

(d) Substances in concentrations or combinations which are toxic or harmful to humans shall not be present in amounts found to be of public health significance, nor shall substances be present in amounts which are acutely harmful to animal, plant or aquatic life.

Wisconsin Admin. Code § NR 102.04(1) provides WDNR with the explicit authority to impose conditions in the Modified Permit and Conditional Certification in order to protect against non-indigenous species spoiling Wisconsin water quality by causing “objectionable deposits on the shore or in the bed” of Wisconsin waters. The rule also provides WDNR with explicit authority to impose conditions to protect surface waters from substances “in amounts which are acutely harmful to animal, plant or aquatic life.” This authority is similar to the language in Wis. Admin. Code § NR 102.04(3)(d) which provides that for all waters classified for fish and aquatic life “unauthorized concentrations of substances are not permitted that alone or in combination with other materials present are toxic to fish or other aquatic life.”

Finally, another water quality criterion Wis. Admin. Code § NR 102.04(5)(a) provides as follows:

All surface waters shall be suitable for supporting recreational use and shall meet the criteria specified in sub. (6).

Further, the WDNR has imposed the WQBELs which have been promulgated as numeric standards, and provided a narrative-based WQBEL for ANS. As the DNR’s expert Ms. Sylvester opines in her Supplemental Affidavit the Modified Permit and Conditional Certification contain both technology based and water quality based effluent limitations. (Sylvester Supplemental Affidavit p. 2, #4) Section 3.3 of the Modified Permit contains a WQBEL for chloride discharges from ballast sea water. (*Id.*, p. 2, #7) Further, 4.2.2.1 of the Modified Permit includes a WQBEL for chlorine. (*Id.*, #9)

Further, in addition to the numeric water quality standards in Wis. Admin. Code chs. NR 102 and 105 contains narrative quality standards, including designated uses and narrative criteria. The narrative water quality standards in Wis. Admin. Code ch. NR 102 apply to ballast water discharges. (*Id.*, #2)

Section 1.2 of the Modified Permit states that discharges may not contain aquatic invasive species or diseases (such as Viral Hemorrhagic Septicemia, or VHS) at a level that would violate the designated use of the waterbody, constitute a threat to public health, safety, or welfare, or contribute to a violation of water quality standards. (*Id.*, #13)

These provisions clearly provide the DNR with specific legal authority to regulate the discharges of ANS in ballast water to protect water quality for recreational uses.

Accordingly, the LCA Motion for Summary Judgment is denied.



### **The Conservation Petitioners Motion**

The Conservation Petitioners offer two legal arguments: first, that the antidegradation provisions should have been applied in this case; secondly, that the U.S. Supreme Court decision *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 US 700 (1994) requires that Wisconsin impose numeric WQBELs in this proceeding. Both arguments fail.

The Conservation Petitioners argue that it is the organisms within rather than ballast water itself that should be considered the effluent discharge, because they are the objectionable “concentrations” within the meaning of Wis. Stat. § 283.01(6). Further, that new individual non-indigenous species cannot be lumped together with the species that were previously introduced into Great Lakes waters, and that the same might impact different existing uses of these waters. (Brief in Support of Motion, pp. 30-31)

DNR reasonably concluded that antidegradation review was unnecessary because, although not previously permitted, the discharges at issue are not considered a new discharge under Wis. Admin. Code NR § 207. DNR’s interpretation of the antidegradation requirements is consistent with that of the U.S. EPA. In the EPA Fact Sheet for the 2008 Vessel General Permit, EPA stated:

EPA believes that the permit’s provisions are consistent with EPA’s antidegradation policy. EPA does not believe that a vessel covered under this permit should be considered a new or increased point source discharge that would foreseeably lower water quality under EPA’s antidegradation regulation, located a 40 CFR 131.12, the typical trigger for antidegradation review. Generally speaking, the vessels covered under this permit and their discharges existed before EPA’s issuance of the VGP and submission of those vessels’ notices of intent to be covered under the VGP. Such existing discharges do not constitute “new or increased point source discharges” that would foreseeably lower water quality within the meaning of 40 CFR § 131.12, and thus do not trigger antidegradation review . . . Again, vessels covered under the VGP will not typically “lower water quality as compared to the prior discharge” since the very same vessels that are being permitted under the VGP constituted the prior unregulated discharges that existed before issuance of the permit. The VGP merely authorizes point source discharges that previously existed but were unregulated by EPA’s NPDES regulations. Such existing discharges are not what EPA’s antidegradation regulation intends to cover . . . . As a result, EPA does not consider vessels covered by this permit to be new or increased point source discharges that would foreseeably [sic] lower water quality for antidegradation purposes, and thus antidegradation review is not triggered.

(LCA App. Ex. 7, at 79-80 (internal citations to EPA’s Water Quality Standards Handbook and Response to Comments for Oregon Water Standards 2004 approval omitted).)

As DNR expert Susan Sylvester opined in her supplemental affidavit, WDNR is in agreement with EPA that vessels covered under the Modified Permit should not be considered a

new or increased point source discharge that would foreseeably lower water quality. Instead, it is expected that the Modified Permit will improve water quality as existing vessels implement the technology-based requirements. (*See* Sylvester Affidavit, Appendix I, Summary of Public Comments and Department Responses, Section Z; Supplemental Affidavit #43)

DNR's interpretation is reasonable as a matter of law, and there is not a disputed issue of fact related to the applicability of the antidegradation issue.

The Conservation Petitioners next argue as follows:

If TBELs alone are insufficient to meet water quality standards, DNR must also establish water quality-based effluent limitations ("WQBELs"). Wis. Stat. § 283.13(5) (DNR "shall establish more stringent effluent limitations than [TBELs] . . . if these limitations are necessary to meet applicable water quality standards . . .") (emphasis added); *see also* Wis. Stat. § 283.31(3)(d)1. (a permit may only issue upon condition that discharges will meet any limitations "more stringent . . . [than existing effluent limitations and standards][n]ecessary to meet . . . state water quality standards."). . . . If WQBELs are necessary, they must be included in a WPDES permit. Wis. Stat. § 283.13(5)(DNR "shall require compliance with . . . water quality based effluent limitations in *any* permit issued . . .).

"Water quality standards are the basis for deriving water quality based effluent limitations and the limitations shall be determined to attain and maintain *uses* and criteria." Wis. Admin. Code § NR 102.01(3) (emphasis added). Thus, WQBELs must be designed to protect designated uses and—under the antidegradation policy—the existing uses of state waters. *See PUD No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700, 715 (1994) ("[a] project that does not comply with a designated use of the water does not comply with the applicable water quality standards."); Wis. Stat. § 283.13(5) (DNR "shall establish more stringent effluent limitations than [TBELs] . . . if these limitations are necessary to meet applicable water quality standards . . . or any other state . . . rule or regulation."); Wis. Admin. Code § NR 102.05(1)(a) ("No waters of the state shall be lowered in quality unless it has been affirmatively demonstrated to the department that such a change is justified as a result of necessary economic and social development, provided that no new or increased effluent interferes with or becomes injurious *to any assigned uses made of or presently possible* in such waters.") (emphasis added).

Even in the absence of water quality criteria for aquatic non-indigenous or invasive species, WQBELs to protect designated uses are necessary if TBELs alone will not protect them.

(Wildlife Petitioners' Initial Brief, pp. 4-5)

The Conservation Petitioners argue that, under Wisconsin law, the DNR must not consider technological constraints with respect to whether to impose WQBELs. The

Conservation Petitioners' argument is summarized succinctly in its Reply Brief: "The (Wisconsin) legislature has decided as a matter of policy that, without exception, DNR **must** regulate the discharge of pollutants with effluent limitations as stringent as necessary to meet water quality standards. Furthermore, the industry must develop the technology necessary to comply with those effluent limitations." (Reply Brief, at p. 2)

However, this is a misreading of Wisconsin law and asks the State of Wisconsin to go well beyond what the USEPA has imposed in its own vessel permits. First, it is not clear which specific provision of Wisconsin law the Conservation Petitioners rely on to say that the Wisconsin legislature has specifically required the shipping industry to develop new technology to prevent the spread of AIS. Nor is it clear which specific water-quality based effluent limitation the Wisconsin Modified Permit is said to violate.

The Conservation Petitioners suggest that the case of *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994) is controlling on Wisconsin law with respect to the issues in this proceeding. However, the Court held as follows: "Having concluded that, pursuant to §401, States **may** condition certification upon any limitations necessary to ensure compliance with state water quality standards or any other 'appropriate requirement of State law,' we consider whether the minimum flow condition is such a limitation." The Court ultimately concluded that the minimum flow requirement, mandated by the Washington Supreme Court's interpretation of Washington state law and its antidegradation policy, was such a requirement. (*See PUD No. 1*, 500 U.S. at 717-718) Significantly, the Court found that there was no textual support under Washington law for the position that the legislature intended to require both a use designation and criteria before a WQBEL *could* be imposed. However, the Court also did not find express authority requiring imposition of WQBELs in every case based solely upon the use designation. *Id.*

The Conservation Petitioners argue that this U.S. Supreme Court decision imposes a mandatory and affirmative requirement of Wisconsin to impose such conditions in water quality certifications as are necessary to enforce a designated use contained in the State's water quality standard. The Minnesota Court of Appeal recently rejected the same arguments in connection with the Minnesota Water Quality Certification. The Minnesota Court of Appeals held: "None of the above-described provisions of law require numeric WQBELs, either in all situations or in the circumstances present in this case. Relators have not identified any other provision of law that would require numeric WQBELs on the ground that narrative WQBELs necessarily are inadequate. The overarching requirement for the MPCA is that its certification 'shall set forth any effluent limitations and other limitations, and monitoring requirements' that it deems necessary. 33 U.S.C. § 1341(d). But the implementing federal regulations do not foreclose the possibility that the MPCA may determine that narrative WQBELs, or some other form of limitations, are adequate to satisfy that standard, without the need for numeric WQBELs." The same is true in the instant proceeding. (*In the Matter of the Decision on the Approval for Submittal of a 401 Water Quality Certification to the U.S. Environmental Protection Agency for the Draft 2013 Vessel General Permit and the Draft 2013 Small Vessel General Permit* (State of Minnesota in Court of Appeals A12-1661))

The Division concurs with the Minnesota Court's reasoning. Further, the Division concurs with the WDNR with respect to its interpretation of the interplay between this case, federal and state law. As the DNR argues, *PUD No. 1* establishes that a State may impose conditions in water quality certifications as necessary to enforce a designated use contained in the State's water quality standard. (emphasis added) WDNR did precisely this in the Modified Permit and Conditional Certification. *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, does not conflict with the Modified permit or the Certification.

For example, Condition 5 of the Conditional Certification states that vessels shall comply with the requirements in (a) through (g) to meet water quality standards for protecting the public interest. (Wis. Admin. Code § NR 102.01(2); Sylvester Supplemental Affidavit at #14) In addition, narrative water quality standards for ballast water discharges were established pursuant to the authority in Wis. Admin. Code § NR 102.04(1). (WDNR Response Brief at pages 8-10). The WDNR has imposed the WQBELs which have been promulgated as numeric standards, and provided a narrative-based WQBEL for ANS. As the DNR's expert Ms. Sylvester opines in her Supplemental Affidavit the Modified Permit and Conditional Certification contain both technology based and water quality based effluent limitations. (Sylvester Supplemental Affidavit p. 2, #4) Section 3.3 of the Modified Permit contains a WQBEL for chloride discharges from ballast sea water. (*Id.*, p. 2, #7) Further, 4.2.2.1 of the Modified Permit includes a WQBEL for chlorine. (*Id.*, #9)

Further, in addition to the numeric water quality standards in Wis. Admin. Code chs. NR 102 and 105 contains narrative quality standards, including designated uses and narrative criteria. The narrative water quality standards in Wis. Admin. Code ch. NR 102 apply to ballast water discharges. (*Id.*, #2)

Section 1.2 of the Modified Permit states that discharges may not contain aquatic invasive species or diseases (such as Viral Hemorrhagic Septicemia, or VHS) at a level that would violate the designated use of the waterbody, constitute a threat to public health, safety, or welfare, or contribute to a violation of water quality standards. (*Id.*, #13)

The DNR permit is consistent with the USEPA Vessel General Permit (VGP). On December 8, 2011, EPA published a draft of the Federal VGP regulating discharges from commercial vessels. (Sylvester Affidavit, p.11, #48; LCA App. Ex. 6: Proposed 2013 Federal VGP) Similar to the Modified State Permit, the Federal VGP proposes technology based numeric standards generally consistent with IMO standards to control the release of non-indigenous invasive species in ballast water discharges (*Id.* at Section 2.2.3.5), but excludes vessels built before January 1, 2009, confined exclusively to the Great Lakes upstream of the Welland Canal (i.e. Lakers) from complying with those standards (*Id.* at Section 2.2.3.5.3.3). In the Federal VGP due to technical challenges associated with installing the necessary ballast water treatment systems in the Laker fleet and the unavailability of necessary technology. (LCA App., Ex. 7: Proposed 2013 EA VGP Fact Sheet, Section 4.4.3.5.6.3.) Under the proposed Federal VGP, Lakers will continue to be required to implement BMPs. The BMPs include

annual assessment and removal of accumulated sediment, minimizing the amount of water taken on near shore and the inspection and repair of sea chest screens.

In declining to impose numeric WQBELs, the fact sheet for the Federal VGP noted that:

EPA has determined that . . . it is infeasible to calculate numeric water quality-based effluent limit for ballast water discharges. While “[i]n principle, a well-supported model of the relationship between invasion risk and organism release could be used to inform a ballast water discharge standard,” the “current state of science does not allow a quantitative evaluation of the relative merits of various [numeric] discharge standards in terms of invasion probability.” Therefore, the lack of available data and information prevents a precise quantification of the risk associated with ballast water discharges (emphasis added). Though EPA believes that the work done by numerous scientists has greatly improved our understanding of the risk posed by ballast water discharge events, and some have clearly quantified a relative reduction in risk by using various standards versus ballast water exchange, EPA agrees with the NAS [National Academy of Science] panel that establishing a precise, quantified ballast water discharge standard more stringent than the numeric TBELs contained in Part 2.2.3.5 of the VGP at this time is not possible with available data and information, and thus, numeric water quality-based effluent limits are infeasible to calculate.

(*Id.* at Section 4.4.3.9.4.1 (internal citations omitted))

The Federal EPA VGP will replace the current 2008 Federal VGP when it expires in December 2013. (*See*: LCA Brief in Support of Motion, pp. 5-6)

Further, based on numerous scientific studies, EPA has determined that “pursuant to 40 C.F.R. 122.44(k)(3), it is infeasible to calculate numeric water quality-based effluent limit for ballast water discharges. . . . EPA agrees with the [National Academies of Science] panel that establishing a precise, quantified ballast water discharge standard more stringent than the numeric [technology-based effluent limits] contained in . . . the VGP at this time is not possible with available data and information, and thus, numeric water quality-based effluent limits are infeasible to calculate.” (VGP2 Fact Sheet at 125, available at Croot Affidavit, Exh. G)

DNR’s decision not to impose additional water quality-based effluent limitations in the Water Quality Certification or Wisconsin General Permit was reasonable as a matter of law.

Further, Wis. Stat. § 281.15(1) also requires that those standards be promulgated as administrative rules (“*The department shall promulgate rules setting standards of water quality. . . .*”). The obvious purpose of that requirement is that any proposed water quality standard be subject to public scrutiny and comment before it is used for regulatory purposes, including the development of a WQBEL. In Wis. Stat. § 281.15(2), the Legislature went on to prescribe in detail the substantive requirements that DNR must follow in promulgating the water quality criteria component of water quality standards.

The Conservation Petitioners are seeking the establishment of a zero discharge standard without the development of a water quality criteria developed through the statutorily required rulemaking process. Petitioners are seeking establishment of a zero discharge standard without the statutorily required analysis of the “*social, economic, energy usage and environmental costs associated with attaining the criteria . . .*,” § 281.15(2)(b). They seek to impose this standard without the required demonstration that a zero discharge standard is “*no more stringent than reasonably necessary to assure attainment of the designated use for the water bodies in question . . .*,” § 281.15(2)(c); and without preparation of a “*technical support document which identified the scientific data utilized, the margin of safety applied and any facts and interpretations of those data applied in deriving the water quality criteria . . .*,” § 281.15(2)(e)

Finally, the Conservation Petitioners move the Division to overrule the reasonable judgment of not only DNR, but also the considered judgments of the US EPA, its Science Advisory Board, the National Academy of Science, and the United States Coast Guard. The Supplemental Affidavit of Susan Sylvester sets forth at length the DNR’s reasonable evaluation of these recent scientific studies on ballast water and how they informed specific provisions of the Certification and Modified Permit. (Sylvester Supplemental Affidavit)

Because its legal arguments are not persuasive, the Conservation Petitioners’ motion for summary judgment must be denied.

### **The DNR Motion**

The DNR seeks summary judgment with respect to the following issues:

The Modified Permit and Conditional Certification contain performance standards and conditions that are the most stringent standards technologically feasible, further that these standards, in combination with the other terms and conditions of the Modified Permit and Conditional Certification, reasonably assure compliance with Wisconsin water quality standards for ANS discharged in ballast water.

Many of the legal issues addressed above obtain in the context of the Department’s Motion. First, the Division has found that as a matter of law that the DNR had authority to include the WQBELS that it did in the Modified Permit; that it did not abuse its discretion but rather reasonably concluded that the anti-degradation provisions did not obtain given that these are not new discharges; and that the Modified Permit was issued on April 1, 2011, two months before Wis. Stat. § 227.10(2m) became effective and that the Conditional Certification is not a “license” issue by WDNR. However, the question remains as to whether any of the affidavits have raised a disputed issue of fact which necessitates a hearing.

The 43 page affidavit of Dr. Andrew Cohen sets forth at length his opinions on numerous issues relating to the history of contaminated ballast water as a primary and secondary vector for the introduction of invasive organisms, as well as on issues relating to the regulation and treatment of ballast water. However, one searches it in vain for any references to either the Wisconsin Modified Permit or the Conditional Certification at issue in this proceeding. At no

point does Dr. Cohen render a direct opinion to a reasonable degree of scientific probability relating to the ineffectiveness of any specific condition of the Permit or Certification to be protective of current uses of Great Lake waters.<sup>2</sup>

The closest his affidavit comes to doing so, and thus to stating a disputed issue of fact in this proceeding, is his assertion that the IMO standards are insufficient to be “even minimally protective” of recreational uses of Great Lakes waters. (Cohen Affidavit, pp. 41-43, #75) However, the DNR permit does not include solely the IMO standards and thus the level of protectiveness of the IMO standards does not automatically create a disputed issue of fact. In addition to the IMO D2 standards, the Modified Permit requires that ocean-going vessels perform open ocean water exchange or saltwater flushing, as well as to meet the IMO D-2 numeric discharge standards. (Sylvester Affidavit, p. 10, #44) Further, Condition 6 of the Conditional Certification allows DNR to require emergency treatment of ballast water prior to discharge if ballast water is un-exchanged or untreated. (Sylvester Supplemental Affidavit, p. 7, #33-34) Section 4.4 of the Modified Permit also allows the DNR to conduct vessel inspections and to collect ballast water samples as provided for in Wis. Admin. Code NR 205.07(1)(d). Accordingly, Dr. Cohen’s affidavit does not establish a disputed issue of fact on this point.

The DNR asserts that it has imposed the most stringent standards that are technologically feasible based upon its review of available and very recent scientific literature. While this is not the precise legal standard governing these Motions,<sup>3</sup> the point provides relevant context, as does the extensive information provided by all sides relating to the judgment of the US EPA and its Science Advisory Board, the National Academy of Science, and the United States Coast Guard. All of these bodies and agencies are in accord with the Department’s position in this matter. (Sylvester Supplemental Affidavit, p. 3-6) Ms. Sylvester, the Bureau Director of the WDNR Water Quality Bureau in the Water Division, notes that she followed the EPA Science Advisory Board proceedings closely and commented on behalf of the WDNR. The SAB was composed of twenty-four scientists, and of those only Dr. Cohen did not concur with the group’s final report. (Sylvester Supplemental Affidavit, p. 4, #19)

In light of the apparent scientific consensus with respect to what it is possible to achieve with respect to stopping potential ballast water spread of ANS, the affidavit of Dr. Cohen would need to present an opinion as to which provision of Wisconsin law relating to either Water Quality Certification or the WPDES Modified Permit requires the building of new onshore treatment plants or boiling stations at every port in the state. (See: Footnote 2 above) In its present form, Dr. Cohen’s affidavit simply does not overcome the DNR’s prima facie showing that it is entitled to summary judgment.

Accordingly, the Division must grant the DNR motion for summary judgment and dismiss the remaining petitions for review.

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<sup>2</sup> Rather, he discusses what “could be” done; namely, boiling all ballast water or discharging to hypothetical onshore treatment plants which would need to be “built at each port where ballast water discharges are to be regulated.” (At p. 28, #51 and p. 40, #73) However, there is no nexus to any relevant Wisconsin legal requirement which would require these apparently unprecedented steps.

<sup>3</sup> The issue is rather whether the Permit and Certification meet applicable water quality criteria set forth in Wis. Admin. Code § NR 102.01(2); 102.04(5)(a), Chapters NR 299 and 105 et al, as described above.

**ORDERS**

WHEREFORE, the Motion for Summary Judgment of the LCA is DENIED, for the reasons set forth above;

IT IS FURTHER ORDERED, that the Motion for Summary Judgment of the Conservation Petitioners be DENIED, for the reasons set forth above;

IT IS FURTHER ORDERED, that the Motion for Summary Judgment of the DNR be GRANTED on all three issues as set forth above, and that the petitions for review be DISMISSED.

Dated at Madison, Wisconsin on November 29, 2012.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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Madison, Wisconsin 53705-5400  
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By: \_\_\_\_\_  
Jeffrey D. Boldt  
Administrative Law Judge



## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be served and filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.